BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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Order Instituting Rulemaking to Implement the Commission's Procurement Incentive Framework and to Examine the Integration of Greenhouse Gas Emissions Standards into Procurement Policies.	Rulemaking 06-04-009 (Filed April 13, 2006)

REPLY COMMENTS OF THE DIVISION OF RATEPAYER ADVOCATES TO ADMINISTRATIVE LAW JUDGES' RULING REQUESTING COMMENTS AND LEGAL BRIEFS ON MARKET ADVISORY COMMITTEE REPORT

I. INTRODUCTION

Pursuant to the July 19, 2007 "Administrative Law Judges' Ruling Requesting Comments and Legal Briefs on Market Advisory Committee Report and Notice of En Banc Hearing" (July 19 Ruling), and the August 8, 2007 "Administrative Law Judges' Ruling Requesting that Parties Address an Additional Legal Issue in Their Reply Briefs, Due August 15, 2007" (August 8 Ruling), the Division of Ratepayer Advocates (DRA) submits the following reply comments. The July 19 and August 8 Rulings contain 54 questions about the "first-seller approach" in the June 30, 2007 Market Advisory Committee (MAC) Report. The first-seller approach would be an alternate way for the California Air Resource Board (CARB) to require compliance with reporting and other regulatory requirements aimed at implementing Assembly Bill (AB) 32, the California Global Warming Solutions Act of 2006.

Parties' comments demonstrate that the issue of whether to implement a load-based or first-seller approach may come down to one critically important and overarching tradeoff: economic versus legal risk. DRA and other parties agree that the first-seller structure would likely increase economic efficiency by internalizing the cost of GHG

emissions into the wholesale price of power. However, if the Commission adopts the first-seller approach, there may be some exposure to legal risk under the Federal Power Act and the dormant Commerce Clause. In addition, the first-seller approach would also impose greater costs to ratepayers and extensive enforcement needs for the myriad potential first-sellers. Therefore, the challenge is in determining which regulatory structure will meet the policy goals established in AB 32 at the least cost to ratepayers.

Despite the improved line of sight for emissions reporting and the economic efficiency offered by the first-seller structure, the attendant legal concerns and ostensibly high costs of enforcing regulations for a broad array of market participants may eclipse these apparent advantages. DRA appreciates the complexity of this dilemma, and hopes to add value to the record in order to assist the CPUC and CEC (Commissions) in reaching a well-informed decision. Consistent with these concerns, DRA offers the following observations and recommendations:

- Due to the wholesale market implications of the first-seller structure, it carries a legal risk of being pre-empted under the Federal Power Act. Additionally, the first-seller structure may raise certain dormant Commerce Clause concerns.
- The Commission needs more input from parties and the California Independent System Operator (CAISO) about the costs and timing issues associated with the load-based versus first-seller approaches and their respective impacts on the implementation of the Integrated Forward Market (IFM). Given the ambitious schedule slated for the August 21, 2007 en banc hearing on the first-seller structure, DRA reiterates that the Commission should convene a separate workshop to address these very critical technical issues facing the CAISO and market participants.
- Having the first seller as the point of regulation could render the program less effective unless it includes increased oversight and enforcement. The complexities and burden of enforcing reporting requirements for the multitude of marketers and other

first sellers/deliverers is one major drawback of the first-seller approach.

- The first-seller structure will likely result in windfall profits to generators at the expense of ratepayers.
- The permit allocation method chosen could also affect the customer price. An auction, while more economically efficient, has the potential to more greatly increase costs to customers than other allocation methods, if not implemented properly.
- As some parties note, the Commission should not limit the exploration of potential GHG emissions regulatory mechanisms to only the first-seller and load-based approaches.

II. DISCUSSION

A. Relevant preemption and interstate commerce issues may render first-seller structure considerations moot.

54. To what degree if any, does the following line of cases suggest that a deliverer/first-seller approach is more likely than a load-based approach to be subject to preemption under the Federal Power Act? *Northern Natural Gas Co. v. Kansas*, 372 U.S. 84 (1963); *Transcontinental Gas Pipe Line Corp. v. Mississippi,* 474 U.S. 409 (1986); *Northwest Central Pipeline Corp. v. Kansas*, 489 U.S. 493 (1989). Please consider these cases in light of *Calif. ex rel. Lockyer v. Dynegy, Inc*., 375 F.3d 831, 842 n8 (2004) (finding that the Federal Power Act and the Natural Gas Act are similar statutory schemes and therefore case law for the two Acts is often interchangeable). Please provide a detailed analysis.

In *Northern Natural Gas Co. v. Kansas*, the Kansas State Corporation Commission required an interstate pipeline "to purchase gas ratably from all wells connecting with its pipeline system in each gas field within the state."[1] In its analysis, the Supreme Court observed that the appellant was "not a producer, but a purchaser of

[1] *Northern Natural Gas Co. v. Kansas*, 372 U.S. 84, 85 (1963).

gas from producers."[2] The Court also pointed out that "it was settled even before the passage of the Natural Gas Act, that *direct* regulation of the prices of wholesales of natural gas in interstate commerce is beyond the constitutional power of the states – whether or not framed to achieve ends, such as conservation, ordinarily within the ambit of state power."[3] The Court then determined that the "federal regulatory scheme leaves no room either for direct state regulation of the prices of interstate wholesales of natural gas . . ., or for state regulations which would indirectly achieve the same result."[4]

In concluding that the regulation was preempted, the Court explained that while conservation is within the sphere of state power, the regulation was defective because it was aimed directly at purchasers rather than producers.[5] The court reached this conclusion despite arguments that "as a practical matter restrictions upon purchasers more effectively and easily achieve ratable taking."[6] Thus, *Northern Natural Gas Co. v. Kansas* applied a "bright line" test, where the focus of the regulation (purchaser/producer) was critical to the analysis of whether or not a regulation is preempted. This case suggests that despite the purported practical benefits of a first-seller approach, as well as the fact that environmental regulations are traditionally within the sphere of state power, that there is a legal risk based on field preemption that is associated with such an approach.[7]

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[2] *Id.* at 90.

[3] *Id.*

[4] *Id.* at 91.

[5] *Id.* at 93-95.

[6] *Id*. at 96.

[7] DRA notes that this case was decided in 1963, and thus it interpreted the Natural Gas Act of 1938, 15 U.S.C. § 717, *et seq*. Congress has subsequently passed the Natural Gas Policy Act of 1978, 15 U.S.C. § 3301, *et seq*.

In *Transcontinental Gas Pipe Line Corp. v. Mississippi*, the Mississippi Oil and Gas Board required "an interstate pipeline to purchase natural gas from all the parties owning interests in a common gas pool."[8] In applying these facts to a regulatory scheme that had been modified by the Natural Gas Policy Act of 1978, the Supreme Court cited *Arkansas Electric Cooperative v. Arkansas Public Service Commission* to support the proposition that when the federal government chooses *not* to regulate in a given area, this may imply that the federal government intended that the area be left unregulated.[9] The Court ruled that as this issue, also known as "negative" preemption:

> "[W]hether Congress, in revising a comprehensive federal regulatory scheme to give market forces a more significant role in determining the supply, the demand, and the price of natural gas, intended to give States the power it had denied FERC. The answer to the [] question must be in the negative."[10]

Thus, the Court stated that: "[t]o the extent that Congress denied FERC the power to regulate affirmatively particular aspects of the first sale of gas, it did so because wanted to leave determination of supply and first sale price to the market."[11] Aside from this analysis, the Court also ruled that the regulation had run afoul with other concerns, such as the uniformity of the federal scheme, and noted that: "Mississippi's order would have the effect of increasing the ultimate price to consumers."[12] The regulation was deemed preempted.[13]

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[8] *Transcontinental Gas Pipe Line Corp. v. Mississippi*, 474 U.S. 409, 411 (1986).

[9] *Id.* at 422 (*citing Arkansas Electric Cooperative v. Arkansas Public Service Commission*, 461 U.S. 375, 384 (1983)).

[10] *Id.*

[11] *Id.*

[12] *Id.* at 423.

[13] *Id.* at 425.

Transcontinental Gas Pipe Line Corp. v. Mississippi is comparable to *Northern Natural Gas Co. v. Kansas*. In *Transcontinental Gas Pipe Line Corp. v. Mississippi*, the Court struck down a similar regulation; this time under the modified statutory framework of the Natural Gas Policy Act of 1978. This case provides further support for the notion that a first-seller approach, which could be deemed as analogous to a purchaser-focused regulation, has some degree of legal risk under preemption doctrine.

In *Northwest Central Pipeline Corp. v. Kansas*, the Supreme Court upheld a regulation that governed the timing of natural gas production.[14] In upholding the regulation, the Court explained:

> "In both *Northern Natural* and *Transco*, States had crossed the dividing line so carefully drawn by Congress in NGA § 1(b) and retained in the NGPA, trespassing on federal territory by imposing purchasing requirements on interstate pipelines. In this case, on the contrary, Kansas has regulated production rates in order to protect producers' correlative rights -- a matter firmly on the States' side of that dividing line."[15]

The Court also distinguished its facts from another case where a state regulation was deemed preempted:

> "Appellant would also find support for its position in *Schneidewind*. *Schneidewind* held that the NGA pre-empted Michigan's regulation of securities issued by interstate pipelines and other natural gas companies engaged in interstate commerce because the regulation fell within an exclusively federal domain. However, not only was the regulation at issue in that case directed to interstate gas companies, but it also had as its central purposes the maintenance of their rates at what the State considered a reasonable level, and their provision of reliable service."[16]

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[14] *Northwest Central Pipeline Corp. v. Kansas*, 489 U.S. 493 (1989).

[15] *Id.* at 514.

[16] *Id.* at 514, n. 10. (*citing Schneidewind v. ANR Pipeline Co.,* 485 U.S. 293, 306-309 (1988)).

Thus, the regulation in question in *Northwest Central Pipeline Corp. v. Kansas* fell under one of the provisions of the Natural Gas Act, which excludes from its application the production or gathering of natural gas.[17] The Natural Gas Act also excludes from its application retail sales and distribution, thus allowing for state regulation in those arenas.[18] There is a parallel section in the Federal Power Act that excludes retail sales from its application.[19] Thus, this case lends support to the notion that a load-based approach, which a court may view in an analogous manner as the regulation in *Northwest Central Pipeline Corp. v. Kansas*, would likely be viewed by a court as not preempted.

This line of cases suggests that a load-based approach would carry fewer legal risks than a first-seller approach. *Calif. ex rel. Lockyer v. Dynegy, Inc*., 375 F.3d 831, 842, n. 8 (9th Cir. 2004) further supports the proposition that these gas cases could be used interchangeably in an analysis of the Federal Power Act. DRA notes that Federal Power Act case law has also followed a "bright-line" approach between the regulations of retail versus wholesale transactions.[20]

45. If you conclude that Federal Power Act preemption would be a problem, could FERC action (*e.g.,* approval of a CAISO tariff rule) ameliorate this problem? If so, what specifically could FERC do? Could FERC ameliorate any Federal Power Act concerns related to publicly-owned utilities?

The CAISO did not file opening comments in response to this question. DRA would like to hear what the CAISO would propose in order to remedy the potential preemption risk concomitant with a first-seller approach.

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[17] *See* 15 U.S.C. § 717(b).

[18] *See* 15 U.S.C. § 717(b); *see also Panhandle Eastern Pipe Line v. Public Service Commission*, 332 U.S. 507, 516-17 (1947).

[19] *See* 16 U.S.C. § 824(b)(1).

[20] *See Federal Power Commission v. Southern California Edison*, 376 U.S. 205 (1964).

B. Other Legal Issues

53. Are there any other legal issues that the Public Utilities Commission and the Energy Commission should consider in deciding whether to investigate the deliverer/first-seller approach further? Explain.

In analyzing this round of legal argument, the Commission should be cognizant of the fact that some commenting parties may be motivated to later challenge the legality of whatever approach CARB approves. In particular, certain parties have proposed that a first-seller approach has a similar level of legal risk as a load-based approach. These analyses do not seem entirely consistent with the currently available precedent.

C. The first-seller approach will pose enforcement challenges and likely result in additional costs to ratepayers.

PG&E and other parties either understate or fail to adequately address the enforcement issues that would face CARB under the first-seller approach. PG&E states that AB 32 ensures that entities importing power into California will be required to report emissions to CARB:

> "Under AB 32, as under most environmental statutes, complying and reporting entities will be under the legal obligation to identify themselves and report their imports to CARB. These reporting requirements would be needed under either the first-seller approach or under a load-based cap. For example, as CARB's AB 32 reporting protocols note, emissions from combustion are reported by facilities or other reporting entities under reporting requirements promulgated by the regulatory authority, e.g. US EPA under 40 Code of Federal Regulations, Part 75. Thus, under AB 32, CARB would require all applicable entities registered in the WECC to report their import-based emissions if they import power into California for ultimate consumption in California."[21]

[21] Comments of Pacific Gas and Electric Company on Market Advisory Committee Recommendation of "First Seller" Regulation of Greenhouse Gas Emissions Under AB 32, August 6, 2007 (PG&E Comments), at 11-12.

While PG&E accurately characterizes the intent of AB 32, there will be practical and possibly jurisdictional hurdles facing CARB in attempting to enforce compliance with AB 32 under the first-seller approach. As noted by the Los Angeles Department of Water and Power (LADWP): "[t]he first-seller approach can have the convoluted result of applying the point of regulation to an out-of-state generator or marketer for delivery of electricity within California, leaving the California retail service provider that caused the energy to be imported into California with no compliance obligation."[22] Additionally, given that there are "hundreds of marketers that participate WECC-wide,"[23] emissions monitoring and compliance enforcement under the first-seller approach would be far more administratively complex than requiring compliance by California's LSEs.

Furthermore, although DRA recognizes that there are economic and operational advantages that make the first-seller structure favorable, inevitable enforcement difficulties could undermine the effectiveness of the policy and/or result in even greater costs to ratepayers in order to ensure compliance. Under a load-based approach, the tracking and reporting of emissions would be centralized and performed by California LSEs, thereby minimizing the number of reporting entities, each of which are squarely within the jurisdiction of the Commission and CARB. In contrast, the first-seller approach would move the point of regulation closer to the source of emissions and thus further away from the traditional regulatory reach of these agencies. Even though all first-seller entities are now subject to these regulations under AB 32, there still remains the significant practical issue of enforcement. While the line of sight to the source of emissions is more direct under a first-seller approach, the multiplicity of potential first-sellers/deliverers would necessitate greater coordination and resources than the load-based approach, by these agencies and the first-sellers.

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[22] Opening Comments of the Los Angeles Department of Water and Power on the Administrative Law Judges' Ruling Requesting Comments and Legal Briefs on Market Advisory Committee Report, August 6, 2007 (LADWP Comments), at 7.

[23] *Id*.

Therefore, while certain parties criticize the administrative complexity and line of sight issues inherent in the load-based approach, they fail to address the clear enforcement challenges that would arise with the implementation of the first-seller structure. PG&E claims that: "[t]he first-seller approach is much easier to administer than a load-based cap, because the first-seller approach more accurately tracks both in-state emissions sources and sources associated with imports from out-of-state."[24] However, as noted, both points of regulation would pose administrative complications which could potentially undermine the accuracy and effectiveness of the emissions reduction program. On balance, contrary to many parties' assertions and its current political momentum, the first-seller structure is not necessarily superior to the load-based approach. Both provide unique tradeoffs and administrative complexities that must be weighed carefully.

D. The first-seller approach would likely result in higher prices to consumers due to windfall profits to generators.

The Natural Resources Defense Council (NRDC) and the Union of Concerned Scientists (UCS) assert that the overall impact on electricity prices would be greater under a first-seller approach, since "generators will include the value of allowances in their bid prices, raising the market price for all power sources."[25] DRA shares this concern as well and notes that the first-seller approach provides the opportunity for the price of all electricity sources, even low-carbon generators, to increase as explored in more detail below.

In the wholesale market, the market-clearing price is set by the 'marginal' generator, the last one whose bid is accepted. If this marginal producer must internalize the cost of carbon in their bid, then the market-clearing price will increase by that cost of carbon. Subsequently, all generators will receive that market-clearing price, even those

[24] PG&E Comments at 4.

[25] Opening Comments of the Natural Resources Defense Council (NRDC) and Union of Concerned Scientists (UCS) on the "First Seller" Approach and Other Recommendations of the Market Advisory Committee Report, August 6, 2007 (NRDC/UCS Comments), at 7.

that do not have to internalize carbon costs (e.g., hydropower and nuclear). The result would be windfall profits to low-carbon generators, and ultimately a magnification of the carbon compliance costs to consumers. This scenario holds regardless of whether emission permits are allocated or auctioned to first-sellers.

PG&E, on the other hand, argues that despite the overall increase in wholesale electricity price under a first-seller approach, retail electricity prices "will be the same or greater under [a] load-based [approach]."[26] PG&E illustrates its arguments using a numerical example. This example compares the ultimate cost to ratepayers under both approaches with extensive assumptions about the price per metric ton of CO2, the running cost of a combined cycle plant, hydro plant and coal plant, and the range of emission rates for coal plants. Without a concerted modeling exercise to verify these assumptions and test under various market conditions, it seems difficult for PG&E to have drawn the above conclusion.

PG&E recommends distributing allowances to load-serving entities while maintaining the point of regulation on first sellers as a solution to avoiding windfall profits to generators. The allowances would be distributed to first sellers through an auction, presumably with the LSEs jointly contributing to a common pool of allowances to achieve optimal economic efficiency. DRA disagrees with the rationale of this approach. Windfall profits result when the marginal generator sets a new market-clearing price that includes its emission costs. This will take place regardless of whether the generator purchases its emission allowance from an auction held jointly by the LSEs, or by CARB. Moreover, it remains unclear how the revenue generated by the LSE-administered auction will be redistributed to ratepayers. If anything, the LSE-administered auction adds an unnecessary administrative layer to the auction design and revenue distribution process.

[26] PG&E Comments at 19.

E. The chosen permit allocation methodology will ultimately affect consumer prices.

The Energy Producers and Users Coalition and the Cogeneration Association of California (EPUC/CAC) suggest that the method for allocating permits will have the most significant effect on consumer rates.[27] While DRA believes other factors will also impact rates, it agrees that the allocation issue is critical. The issue of allocations was considered in Burtraw et al.'s "The Effect of Allowance Allocation on the Cost of Carbon Emission Trading."[28] The authors concluded that in the Regional Greenhouse Gas Initiative (RGGI) market, an auctioning system would have increased the price of electricity twice as much than if allowances had been allocated at no cost, based on prior use. Although there are differences between California's electricity market and the RGGI markets explored in the Burtraw paper, consumer prices will likely be similarly affected. This is because under an auction, all permits must be purchased, and regulated entities can pass on much of that cost to the consumer. When permits are allocated at no cost, the value of the permit is not necessarily passed on to the consumers. Consumers instead pay for only the additional permits that a regulated entity must purchase. Similarly, any profits gained from selling excess permits may also not be passed on to the consumer.

However, the impact on consumers of an auction system could be mitigated using revenues from the auctions themselves. The MAC Report[29] and Burtraw et al. conclude

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[27] Comments on the Market Advisory Committee Report of the Energy Producers and Users Coalition and the Cogeneration Association of California, August 6, 2007 (Comments of EPUC/CAC), at 18-20.

[28] Burtraw, Dallas, Karen Palmer, Ranjit Bharvirkar, and Anthony Paul. "The Effect of Allowance Allocation on the Cost of Carbon Emission Trading," Resources for the Future, Washington, DC. August 2001 (Burtraw Paper).

[29] "Recommendations for Designing a Greenhouse Gas Cap-and-Trade System for California Recommendations of the Market Advisory Committee to the Air Resources Board", June 30, 2007 (MAC Report).

that allocating permits by auction would provide overall greater social benefits.[30] An auction system could therefore be beneficial even to ratepayers if proceeds are used to offset consumers' higher costs.

F. The Commission should remain open to other regulatory options.

There seems to be considerable momentum for the first-seller approach among the commenting parties. However, DRA is greatly concerned over some of the legal and enforcement issues, as well as the potential costs to ratepayers under this approach. While DRA is not at this time advocating one approach over the other, DRA strongly urges the Commission to carefully weigh all potential regulatory mechanisms.

DRA appreciates the comments of parties that attempt to focus on the prioritization of threshold issues in this case while also encouraging the Commission to explore alternatives to the first-seller and load-based approaches. NRDC and UCS attempt to distill the criteria for evaluating the first-seller and load-based approaches into four critical components: (1) Precision of emissions accounting; (2) Cost to consumers; (3) Ability to serve as a model for other cap and trade programs and integrate into a federal program; and (4) Ability to promote long-term emission reduction strategies.[31] DRA would obviously make the cost to consumers the highest priority, but generally agrees that these issues reflect the key differences between the two approaches. Using these criteria as a guideline, the Commission should remain open to other regulatory mechanisms, such as the hybrid approach suggested by the EPUC/CAC.[32]

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[30] Burtraw Paper.

[31] NRDC/UCS Comments at 5.

[32] Comments of EPUC/CAC at 48-49.

III. CONCLUSION

For the foregoing reasons, the CPUC and CEC should consider DRA's recommendations as set forth herein. DRA looks forward to participating in the upcoming en banc hearing on August 21, 2007, in order to explore these critical issues further.

Respectfully submitted,

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Executed on August 15, 2007 at San Francisco, California.

/s/ JANET V. ALVIAR
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